

CERTIFIED FOR PARTIAL PUBLICATION\*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD LAROY STEVENS,

Defendant and Appellant.

C036593

(Super. Ct. No. CM013774)

OPINION ON REHEARING

APPEAL from a judgment of the Superior Court of Butte County. Gerald Hermansen, Judge. Affirmed as modified.

Deborah Prucha, under appointment by the Court for Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Senior Assistant Attorney General, Rachelle A. Newcomb and Paul E. O'Connor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Donald Laroy Stevens entered a negotiated plea of no contest to one count of evading a police officer (Veh. Code,

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\* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part I.

§ 2800.2) and one count of driving with more than 0.08 percent alcohol in his blood (Veh. Code, § 23152, subd. (b)), admitted a prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) and two prior convictions for driving under the influence (DUI), and was sentenced to an aggregate term of four years in prison. On appeal, defendant challenges orders requiring him to pay \$400 for the costs of court-appointed counsel and to report to the parole office in Kern County upon his release from prison. For the reasons stated below, we shall modify the judgment and affirm the judgment as modified.

#### PROCEDURAL BACKGROUND

The facts of the underlying offenses are irrelevant to the issues raised on appeal. In March 2000, while on parole from Kern County, defendant was charged with evading a police officer, driving under the influence of alcohol, and driving with more than 0.08 percent alcohol in his blood. The complaint also alleged defendant had served three prior prison terms and suffered two prior DUI convictions. At his initial arraignment, the court appointed a contract public defender to represent defendant. At that time, defendant signed a form indicating that when his case was concluded the court would hold a hearing to determine whether he had the ability to repay the county for all or a part of his attorney's services.

In May 2000, at the time set for the preliminary hearing, defendant agreed to plead no contest to the first and third counts and to admit the two prior DUI convictions and one prior prison term, in exchange for dismissal of the second count and

the two other prior prison term allegations. The probation report recommended that defendant pay a \$1,000 restitution fine pursuant to Penal Code section 1202.4, subdivision (b), with a second \$1,000 restitution fine suspended pursuant to Penal Code section 1202.45. Although the report formally recommended that the court order defendant to report to the parole office nearest his last legal residence upon his release from prison, the report also suggested that because defendant had committed the instant offenses specifically so that he could be paroled in Butte County, he should instead be paroled in Bakersfield. The probation report contained nothing about whether defendant should be ordered to pay for the services of his attorney.

At a sentencing hearing in September 2000, after sentencing defendant to four years in prison, the court ordered as follows: "Attorney's fees will be in the standard amount of four hundred dollars. You are ordered to pay a restitution fund fine to the State of California in the amount of two hundred fifty dollars. That same amount will be ordered and stayed pending successful completion of your parole which will be for a minimum of three years. [¶] Upon you [sic] release from prison within forty-eight hours of that release you are ordered to report to the parole office in Kern County." Defense counsel did not object to any of these orders.<sup>1</sup>

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<sup>1</sup> On the issue of attorney fees, the following box is checked on the "Sentencing/Disposition Minute Order": "Counsel advises that \$ 400.00 in expenses have been incurred & Court finds that to be a reasonable sum. The matter is referred to Butte County Collections to determine defendant's ability to pay." In

## DISCUSSION

### I

Defendant first asserts the trial court erred in ordering him to pay \$400 for court-appointed counsel pursuant to Penal Code section 987.8 because (1) "the court failed to find unusual circumstances showing that [defendant] had an ability to pay the fees"; and (2) defendant "was not provided with the required notice of the court's action." Acknowledging that his trial counsel failed to object in the trial court to the lack of notice or to the fee order itself, defendant also contends he received ineffective assistance of counsel.

Penal Code section 987.8 provides, in relevant part, as follows: "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. . . . [¶] . . . [¶] If the court determines that the defendant has the present ability to pay all or a part of

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keeping with the transcript of the sentencing hearing, however, the abstract of judgment indicates only the following: "Defendant to pay Public Defender costs of \$400.00." Because the minute order appears to contain boilerplate language, we believe the transcript of the sentencing hearing and the abstract of judgment more accurately reflect the court's actual order in this case. (See *People v. Smith* (1983) 33 Cal.3d 596, 599 [when the record is in conflict, the part of the record that is entitled to greater credence will prevail].)

the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability." (Pen. Code, § 987.8, subds. (b), (e).)

Here, the court ordered defendant to pay "the standard amount" of \$400 in attorney fees at the sentencing hearing. Defendant contends the court erred because he had no notice attorney fees would be at issue at the sentencing hearing. The People contend that because defense counsel did not assert a lack of notice when the court made its attorney fees order, any claim of error in that regard has been waived. We agree.

"The rule that contentions not raised in the trial court will not be considered on appeal is founded on considerations of fairness to the court and opposing party, and on the practical need for an orderly and efficient administration of the law." (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.) In *People v. Whisenand* (1995) 37 Cal.App.4th 1383, the defendant did not object to the lack of notice regarding payment of attorney fees in the trial court, and the appellate court held that the defendant was precluded from raising the issue on appeal. The appellate court noted that if a timely objection had been made, the trial court could have allowed testimony on ability to pay or scheduled further hearings. (*Id.* at p. 1395.) Here, by failing to object to the lack of notice below, defendant waived the right to complain of the lack of notice on appeal.

Defendant also contends the trial court erred in ordering him to pay attorney fees because the court failed to find "unusual circumstances" showing that he had an ability to pay the fees. We reject that argument for the same reason we rejected defendant's lack of notice argument -- because he waived his claim of error by failing to raise it in the trial court. Defendant argues the matter was preserved for review on appeal despite the failure to raise it below because in the absence of a finding of ability to pay the attorney fees order constituted an unauthorized sentence. (See *People v. Scott* (1994) 9 Cal.4th 331, 354.) He is mistaken. An unauthorized sentence is one that "could not lawfully be imposed under any circumstance in the particular case." (*Ibid.*) "In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*Ibid.*) Here, defendant's claim on appeal is that the order requiring him to pay \$400 in attorney fees was imposed in a procedurally and factually flawed manner. Under *Scott*, the order was not an unauthorized sentence, and therefore the failure to object below resulted in a waiver that precludes defendant from raising the issue on appeal.

Recognizing that his claims of error regarding the attorney fees order likely were waived by defense counsel's failure to raise them below, defendant contends he received ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim, a defendant must show "that his counsel's performance was deficient when measured against the standard of

a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant." (*People v. Kipp* (1998) 18 Cal.4th 349, 366.) On the first element, defendant contends his counsel's performance was deficient because "there is no credible reason or valid tactical reason for trial counsel failing to object to the court's imposition of attorney fees." We disagree.

As noted above, the court may order a defendant to pay all or part of the costs of his public defender if the court determines the defendant has the ability to pay. Ability to pay means "the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her," based on both the defendant's "present financial position" and the defendant's "reasonably discernible future financial position" over a period no more than six months from the date of the hearing. (Pen. Code, § 987.8, subd. (g)(2).) "Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." (Pen. Code, § 987.8, subd. (g)(2)(B).)

Defendant contends that because he was sentenced to state prison, he had no ability to pay attorney fees, and therefore defense counsel had no valid tactical reason for not objecting to the attorney fees order. The flaw in that argument is that under Penal Code section 987.8 the determination of a defendant's ability to pay is not limited to an examination

of the defendant's *future* financial ability; it also includes "[t]he defendant's present financial position." (Pen. Code, § 987.8, subd. (g)(2)(A).) There is evidence in the record that suggests defendant may have been in a financial position to pay \$400 in attorney fees at the time of the sentencing hearing. The probation report notes that he was unemployed because he was incarcerated, but it also notes that he had a monthly income of \$850 before he was incarcerated, with monthly expenses of only \$400, plus \$200 in cash and \$200 in personal property. Beyond what is in the record, we do not know what additional facts defense counsel may have known about defendant's financial position that might have explained his failure to object to the order requiring defendant to pay \$400 in fees. Because the record does not affirmatively disclose that defense counsel had no valid reason for not objecting to the attorney fees order, the proper avenue for the resolution of defendant's ineffective assistance of counsel claim is a habeas corpus proceeding, where defense counsel will have an opportunity to explain the reasons for his conduct. (See, e.g., *People v. Wilson* (1992) 3 Cal.4th 926, 936; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

## II

Defendant asserts the trial court erred in ordering him to report to the parole office in Kern County upon his release from prison because the court has no authority to establish conditions of parole, such as the place of parole. The People agree, asserting the trial court had no authority to direct defendant to report to a specific parole office upon his release



from prison. For the reasons that follow, we accept the People's concession and find the trial court erred in ordering defendant to report to the parole office in Kern County upon his release.

Penal Code section 3003 dictates that "[e]xcept as otherwise provided in this section, an inmate who is released on parole shall be returned to the county that was the last legal residence of the inmate prior to his or her incarceration." (Pen. Code, § 3003, subd. (a).) The paroling authority (either the Board of Prison Terms or the Department of Corrections) has the authority to decide whether an inmate should be returned to another county. (Pen. Code, § 3003, subd. (b).) No such authority is vested in the court. When the court imposes a determinate prison sentence under Penal Code section 1170, the court is required to "inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000." (Pen. Code, § 1170, subd. (c).) In only one circumstance, however, is the court authorized to direct the defendant to report to a particular parole office. Under subdivision (a)(3) of Penal Code section 1170, when "the amount of preimprisonment credit . . . is equal to or exceeds any sentence imposed pursuant to this chapter, . . . [t]he court shall advise the defendant that he or she shall serve a period of parole and order the defendant to report to the parole office closest to the defendant's last legal residence, unless the in-custody credits equal the total

sentence, including both confinement time and the period of parole." (Pen. Code, § 1170, subd. (a)(3).)

Here, the trial court ordered defendant to report to the parole office in Kern County. If defendant's presentence credits had equaled or exceeded the four-year prison term the court imposed, the court would have been required under subdivision (a)(3) of Penal Code section 1170 to order defendant "to report to the parole office closest to the defendant's last legal residence." Furthermore, the court's order directing defendant to report to the parole office in Kern County might have been proper so long as there was sufficient evidence in the record to support a finding that defendant's "last legal residence" was in Kern County rather than Butte County. In this instance, however, where defendant's presentence credits were less than the prison term the court imposed, the court had no authority to order defendant to report to a particular parole office. The choice of county in which defendant is to serve his term of parole following his incarceration is a matter for the paroling authority under Penal Code section 3000.

Accordingly, the trial court erred in ordering defendant to report to the parole office in Kern County upon his release from prison. We shall modify the judgment to strike that aspect of defendant's sentence. Because the abstract of judgment does not reflect the court's order that defendant report to the parole office in Kern County upon his release from prison, no amendment to the abstract is required.

DISPOSITION

The order directing defendant to report to the parole office in Kern County upon his release from prison is stricken and the judgment is affirmed as modified. (CERTIFIED FOR PARTIAL PUBLICATION.)

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CALLAHAN, J.

We concur:

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SIMS, Acting P.J.

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HULL, J.